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IMPEACHMENT OF THE PRESIDENT

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION

OF THE COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

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Statement of Professor Richard D. Parker:

Having reviewed a variety interpretations, historic and contemporary, of standards for impeachment of a President by the House of Representatives, I shall briefly address three issues. First, what agreement is there on basic parameters that should frame a discussion of "impeachable" presidential behavior under Article II, Section 4 of the Constitution? Second, what should be made of claims that obstruction of justice (including lying under oath) in federal judicial proceedings is not impeachable if the behavior arose out of "personal" or "private" affairs of the President? And, third, if behavior is determined to be impeachable, what sorts of considerations may appropriately guide the House of Representatives in deciding whether to go on and vote to impeach the President?

## A. Parameters of "Impeachable" Behavior

(1) It is important to begin with a basic distinction: A determination that presidential behavior is "impeachable" does not necessarily mean that, once such behavior is proved, the House of Representatives has to impeach the President. Questions of "what is impeachable" and of "whether to impeach" are, in principle, distinct. Considerations sufficient to answer the first question may not be sufficient -- taken by themselves -- to resolve the second.

(2) The language of Article II, Section 4 which describes impeachable behavior -- "Treason, Bribery or other high Crimes and Misdemeanors" -- is meant to impose some limitation on the power to impeach. It is mistaken to say that the House may define this language in any way it wishes. For that is to claim that there is, in principle, no limitation on the power.

(3) On the other hand, it is evident that the exact scope of the power is anything but clear. The pre-1787 practice of impeachment in England, on which our constitutional provision was modelled semantically, does not resolve the matter. Nor do truncated references to it in the records of the constitutional convention or the Federalist Papers. Nor, finally, do the precedents in which Congress has considered the matter. The precedents (particularly those involving impeachment of presidents) are simply too rare and too bound up in specific contexts to yield a precise definition -- precise enough, that is, to resolve unprecedented issues arising in novel contexts.

(4) That means that interpretation of the constitutional language must evolve through case-by-case consideration of concrete issues in particular contexts. This is hardly unusual. The interpretation of a great many constitutional provisions -- including provisions that assign powers to government -- has, necessarily, evolved through time, adapting to and gathering meaning from specific circumstances.

(5) Nor is the evolving, situational nature of the language's meaning somehow "unfair" to the President. It is crucial to keep in mind that impeachment involves only removal from office. It is not "punishment." Article I, Section 3 makes that clear. The same Section allows for criminal punishment as a separate matter after impeachment. Hence, the standards of "fair warning" that apply to safeguard a defendant in a criminal prosecution do not apply to impeachment. The Federalist No. 65 makes this point, observing that impeachment "can never be tied down by such strict rules, either in the delineation of the offense by the prosecutors or in the construction of it by the judges, as in common cases serve to limit the discretion of courts in favor of personal security."

(6) What, then, can be said generally about the broad contours -- and limitations -- of the constitutional language within which the Congress must exercise discretion? It appears that

students of the subject agree on five propositions: (a) The predicate of impeachment must involve proof of specific acts or omissions rather than a generalized description of misbehavior. (b) The standard for "impeachable" presidential conduct is not necessarily the same as for "impeachable" behavior by judges or cabinet officers. On one hand, the standard for the President might have to be more tolerant of misbehavior. (Unlike the other officials, for example, the President is elected.) On the other hand, it might need to be less tolerant. (The President, for example, is far more powerful.) Reasonable people may disagree about that, but agree that the presidential standard is unique. (c) The range of impeachable conduct is not limited to behavior currently punishable under criminal law. Nor is impeachment necessarily subject to the exact technical requirements and defenses -- for instance, the intent requirements, the exclusionary rule or the entrapment defense -- applicable in a criminal prosecution. Yet, at the same time, not all criminal behavior is necessarily impeachable. (d) The Congress should look , by way of analogy, to "Treason" and "Bribery" in considering the scope of "other high Crimes and Misdemeanors." (e) And, finally, if an overarching description can be made of the latter, it is that "high" misbehavior must transcend mere "maladministration." It must be "grave" or "gross" or "serious."

(7) Can anything more be said about the level of "gravity" that is required? Attempts are common. Most of them have to do with the "official" nature of the misbehavior: (a) Some say that impeachable conduct should be limited to offenses against "the State" or "the Republic" or the "constitutional order." (b) Others say it should, at least, involve performance (or non-performance) of the official duties of the President. (c) Still others say that it must involve some use of the powers or privileges of the office, whether or not within the scope of official duties. And (d) some say that it should just be limited to conduct by the President while in office. Yet nearly everyone seems to agree that a President found to have murdered someone or to have committed child abuse -- even before assuming office -- is impeachable. Thus, as with so many efforts at general definition of constitutional powers, we find ourselves retreating to the most

capacious standard of all: (e) Impeachable behavior is behavior that, once found out, gravely damages the capacity of the President to lead -- that gravely impairs his fitness for office.

## B. What About Obstruction of Justice In Federal Judicial Proceedings Arising Out Of The "Personal" or "Private" Affairs of the President?

Seeking to short-circuit application of this standard, some now claim that conduct arising out of the private affairs of the President can never gravely impair his fitness for public office and, hence, can never be impeachable. So sweeping a claim cannot be sustained, however. For it would rule out a case of murder committed for private motives. The claim might then be amended to bar impeachment for conduct arising out of one sub-category of the President's private life: his sex life. But that cannot be sustained either. For it is not hard to imagine cases of murder arising from just that source. Thus the claim might be amended again, to advocate a presumption against impeachment for conduct arising out of the President's private life, a presumption that could be overcome only if the conduct itself were very, very "grave" or "gross" or "serious." Now, we're almost back where we began, but with the scales sharply tilted against impeachability for misbehavior whose source is "personal" or "private."

This now-familiar line of argument concludes as follows: Lying under oath and obstruction of justice in federal judicial proceedings are, even if proved, not impeachable because they simply are not sufficiently "grave" or sufficiently "gross" or sufficiently "serious," so long as such conduct arose from the President's private affairs.

I would like to make four comments on this claim.

(1) Strictly as a matter of principle, it is not clear why substantial presidential misconduct

should be presumed non-impeachable just because it "arose from" a realm of "private" life. Is the claim that the "value" of privacy should usually immunize any misbehavior -- public misbehavior -- springing from this realm? Is it too "embarrassing" or too "unseemly" (whatever that means) to look into such misbehavior? Is the idea that small motives cannot lead to large transgressions?

These notions are peculiar enough in themselves. But, in terms of constitutional principle, they make no sense. The reason is that the phrase, "other high Crimes and Misdemeanors," must be understood in light of "Bribery," one of its referents. Acts of bribery -- as is well known -- tend to arise from the "private" lives of the actors. The fact that bribery may arise from private greed (or need) does not presumptively immunize it from impeachment. Why, then, should public acts be presumptively immunized solely on the ground that they arose from private lust?

(2) It is, of course, common to imagine that "the standard" for impeachment is established by President Nixon's misbehavior. It is equally common to characterize Nixon's misbehavior as imminently threatening the destruction of the Constitution. Such hyperbole aside, it is useful to recall another impeachment issue from the same era. It involved Vice President Spiro Agnew. A criminal investigation in Maryland uncovered evidence that Agnew had solicited and accepted kickbacks from local contractors before assuming his federal office -- and that he had then received some payments from the same contractors in his office in the White House. Attempting to forestall this investigation, the Vice President employed three main strategies. One was denial. Another was to attack the chief prosecutor. And the third was to "go to the House." He sought, that is, to persuade the House of Representatives to initiate impeachment proceedings against him. The leaders of the House chose to defer to the criminal prosecutors. But what if the prosecutors had, instead, deferred to them? In that case, wouldn't the House have looked into the matter? And, if it had begun impeachment proceedings against Agnew, who would have argued that his misbehavior was presumptively immunized just because it arose from his private life?

To be sure, Spiro Agnew was "only" a Vice President. What, then, if it had been President Nixon who was shown to have solicited and accepted bribes from Maryland contractors? It was one thing to argue that Nixon should not be impeached for income tax evasion. It would have been quite another to argue that bribery was not even impeachable. The reason, again, is that "Bribery" is one of the two referents of "other high Crimes and Misdemeanors." Minimal fidelity to the Constitution demands that bribery be taken very seriously -- working, at the very least, from a presumption that any act of bribery is impeachable. So, again, we must ask ourselves: What constitutional difference is there between greed and lust as motivations for presidential misconduct?

(3) Now, consider another hypothetical situation: Suppose the President were shown to have bribed the judge in a civil lawsuit against him for sexual harassment, seeking to cover up embarrassing evidence. As bribery, this act would be impeachable, despite its source in the President's sex life. What is the difference between that and lying under oath or obstructing justice in the same judicial proceeding -- to say nothing of before a federal grand jury -- for the same purpose? By analogy, both sorts of behavior would seem grossly to pervert, even to mock, the course of justice in a court of the United States. Is that not so?

(4) We hear, however, that lying under oath and obstruction of justice in federal court are simply too trivial to be analogized to bribery -- and surely too trivial to count as "grave" or "gross" or "serious" presidential misconduct. The argument is: "Everyone does it." Or: "Everyone does it in civil cases." Or: "Everyone does it in civil cases about sex." Or at least: "Everyone can understand doing it." One response to these arguments is to pause and let them sink in.

Because the arguments are now so familiar, however, four further responses are helpful. (a) Even if it is true that lying under oath and obstruction of justice in federal court are really so

common nowadays, it is not clear what should follow. Why wouldn't that be a reason to take such misbehavior more rather than less seriously? When we hear that a problem (and, in this case, crime) is becoming more common, we often respond by calling for a crackdown on it. Why not here? (b) If we truly no longer care very much about this kind of misconduct, are we willing to say so generally? Are we willing to acknowledge it -- and to accept the complicity of the legal profession in it -- openly? If not, why not? (c) What evidence is there for the proposition that participants in federal judicial proceedings do not, in fact, regard lying under oath and obstruction of justice as a "grave" matter? And (d) if we still do want to treat such acts by ordinary people as a "serious" matter, why are they not "serious" when done by a President? If we do not treat them as "serious" when done by a President, how can we keep treating them as "serious" when done by ordinary people?

I don't pretend to know the answers to all these questions. But they add to my conclusion that a consideration of the "gravity" or "seriousness" of such presidential misconduct should not be short-circuited solely on the ground that the misconduct arose out of the President's private life.

## C. Whether to Impeach

If the House of Representatives concludes that the President's misconduct, once proven, is impeachable, it must then face the distinct question of whether to impeach him. Because members of the House are uniquely entitled -- and, as I'll note, uniquely suited -- to answer this question, there is little that I, testifying as an academic "expert" on the Constitution, should say about it. I, therefore, will simply comment on five possible elements of the decision to be made by the House.

(1) Ultimately, as I have already indicated, it is a decision about the President's fitness for office. Though it must be predicated on proof of specific acts or omissions, it must focus, in the

end, on inferences to be drawn from such acts or omissions in the particular case, with respect to the particular person responsible for them. That is to say, it must focus on the character of the President. That is the bottom line.

This may strike some as troubling. (a) How, after all, is personal character to be judged? There is certainly no science to rely on. But, in criminal and civil trials, juries make such judgments every day. These judgments inevitably affect a jury's assessment of the credibility of witnesses and the relative desert of parties to litigation. What's more, we all draw inferences about character from the behavior of others in our ordinary lives. On that basis, we decide whether to do business with someone, whether to rely on someone. It's not a science, but neither is it rocket science. (b) But how, in particular, is character to be judged to determine fitness for office? How do we know what "fitness for office" means? Obviously, there is no "correct" answer to this question. Conceptions of "fitness" may vary at any one time in our history, and they may vary from time to time. Yet, again, we all make such judgments every day whether in evaluating the fitness for office of our boss or our subordinate. (c) Haven't the voters already made this judgment, however, in the case of the President? Yes, they have. And if, at that time, the voters knew about the misconduct at issue, then it seems to me that the House should take that fact very much into account. If, for instance, the voters in 1972 had known Spiro Agnew had solicited and taken kickbacks from Maryland contractors, that knowledge would have been relevant (though not necessarily determinative) in an impeachment inquiry. By the same token, if the voters in 1996 knew, in fact, of lying under oath or obstruction of justice in federal court by the President, that too should be relevant.

(2) The judgment the House of Representatives must make is a political judgment. It is, however, a political judgment of a specific, limited kind. (a) If anything is clear in the discussion of impeachment in The Federalist No. 65 and 66, it is that partisan -- or "factional" -- politics ought

not determine the decision whether to impeach. Partisan loyalty should not impel a member of the House to vote "aye" -- or to vote "nay." Either way, it would tend to dilute or pervert the standard for impeachable behavior, turning it into mere opposition to, or support for, the policies of the President. (b) At the same time, it is not just appropriate, but desirable and even necessary that another sort of politics be brought to bear on the decision. That is "institutional" politics. The Constitution's framers believed that, as a check on presidential misbehavior, periodic elections were insufficient. Hence, the provision for impeachment. And, in order to make effective this between-elections checking mechanism, they assigned responsibility for it to a body with (what they called) an institutional "motive" to do the job with vigor -- the Congress. The framers, in other words, relied on an institutional rivalry between the legislative and executive branches of government to motivate the former to discipline the latter. It follows that members of Congress should not be embarrassed to criticize vigilantly a President's misconduct -- and to draw inferences from it about his fitness for office. For that is their job. (c) Finally, by assigning this job to the Congress rather than to the Supreme Court, the framers intended that yet another sort of politics should have influence in the process. Members of Congress are elected to act for the good of the country. And they must be expected to pay attention to the views of their constituents. Thus no Member ought be embarrassed to factor that goal and those views into his or her vote. Impeachment , after all, is supposed to be an integral part of -- not external to -- our democracy.

(3) If impeachment of the President is purposely rooted in the separation of powers, what about the effects of impeachment on the separation of powers? The claim is often made that the House should be very, very reluctant to impeach for fear of the effect on the institution of the presidency. Impeachment is sometimes described as a legislative "coup." Its consequences are said to include "immobilization" of the presidency, a destruction of its "independence." For the presidency, we are told, is "fragile." It should be handled, if at all, with the greatest care.

Of course, the decision whether to impeach should attend to likely consequences, especially institutional consequences. And background assumptions about the strength or weakness of the presidency, at a particular stage in our history, must affect an assessment of those consequences. In this century, however, its power has grown. That is obvious. True, its power has ebbed and flowed from time to time. But a description the modern presidency as inherently "fragile" is nothing short of bizarre -- about as bizarre as a description of impeachment, provided for in Article II, as inherently equivalent to a "coup." If a study of our constitutional history shows anything, it is that each branch of the government, when tested, has gone on to prove its tensile strength.

(4) Yet an argument is made that, as the power of the presidency has grown, its nature -- and, so, what counts as fitness for the office -- have changed. Multiple modern presidents, it is said, committed impeachable acts. They weren't impeached; hence, their successors shouldn't be. This argument flips the previous one upside-down. But it is hardly less bizarre. If it is true that the presidency has accumulated power through a pattern of impeachable behavior, that would seem a reason, at long last, for Congress to check this aggrandizement -- not collapse in the face of it.

(5) There is, finally, the question whether disapproval of the chief accuser in a case counts as an appropriate ground for voting against the prescribed sanction. Vice President Agnew, I've noted, raised the issue. So did President Nixon. No doubt, the House may consider the matter. But this is a constitutional process. It has to do with the misbehavior of one person, the President. At issue is his removal from office. It is not a criminal trial. It is not the O.J. Simpson case.

The Minority Leader put the point dramatically. Impeachment, he said, is the "most important thing we do" short of declaring war. For that reason the House of Representatives needs to focus on the two fundamental inquiries: What did this President do? Is he fit to be President?

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Law Clerk, Judge J. Skelly Wright, U.S. Court of Appeals, 1970-1971.
Law Clerk, Justice Potter Stewart, U.S. Supreme Court, 1971-1972.
Attorney, Coudert Freres, Paris, France, 1973.
Attorney, Children's Defense Fund, Cambridge, MA, 1973-1974.
Assistant Professor, Harvard Law School, 1974-1979.
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## SELECTED PUBLICATIONS

"The Past of Constitutional Theory -- and Its Future," 42 Ohio State Law Journal 223 (1981).

"Issues of Community and Liberty," 8 Harvard Journal of Law & Public Policy 287 (1985).

"The Effective Enjoyment of Rights," in C. Joerges & D. Trubek, eds., Critical Legal Thought: An American-German Debate 485 (1989).

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